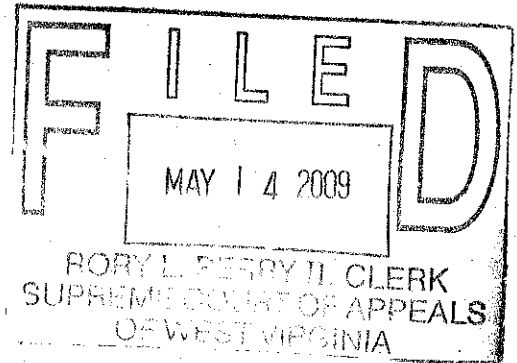


No. 34711

IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

CHARLESTON



STATE OF WEST VIRGINIA,

Plaintiff Below, Appellee,

v.

RICHARD BOOTH

Underlying Proceeding

No. 07-F-51

Ohio County Circuit Court

Defendant Below, Appellant.

APPELLANT'S REPLY BRIEF

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TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF
APPEALS OF WEST VIRGINIA:

HON. BRENT D. BENJAMIN, CHIEF JUSTICE
HON. ROBIN JEAN DAVIS, JUSTICE
HON. THOMAS E. MCHUGH, JUSTICE
HON., MARGARET L. WORKMAN JUSTICE
HON. MENIS E. KETCHUM, III, JUSTICE

HON. RORY L. PERRY, II, CLERK

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The Circuit Court of Ohio County abused its discretion and violated state and federal constitutional law in sentencing the Defendant to a term of incarceration of eighty (80) years in the West Virginia State Penitentiary because the sentence pronounced after accepting a negotiated guilty plea to an attempted purse-snatching is impermissibly harsh and disproportionate to the underlying facts of the case.

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**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
-CHARLESTON-**

RICHARD BOOTH,

Petitioner,

v.

CASE NO. 34711

STATE OF WEST VIRGINIA,

Respondent.

STATEMENT OF INACCURACIES AND OMISSIONS IN APPELLEE'S BRIEF

The State incorrectly asserts that Mrs. Schafer fractured or shattered her hip when Mr. Booth "drug" [sic] her to the ground. Brief of Appellee pp. 7&11. Mr. Booth pulled on Mrs. Schafer's purse in an attempt to take it from her and as a result of him pulling on the purse she fell to the ground. Once Mrs. Schafer fell Mr. Booth let go of the purse and ran back to his friends in the waiting car. Mr. Booth never put his hands on Mrs. Schafer's person - only her purse.

Mrs. Doris Schafer, came to the initial preliminary hearing in Ohio County Magistrate Court, held within approximately ten days of the incident, and did not appear to be injured by the fall she suffered as a result of the attempted purse-snatching. The initial x-rays taken the night of the incident at the Ohio Valley Medical Center Emergency Room were negative. (TR-62). The diagnosis by Dr. John D. Freed, M.D. on the night of the incident was "contusion left shoulder and left hip." (TR-64). Subsequently, months after the incident, she underwent an MRI which indicated a hairline hip fracture. This

resulted in hip surgery that was not successful and required a second surgery. (TR-249, 250).

The State incorrectly asserts that Mrs. Schafer was not at the sentencing hearing because she was "traumatized" by the incident and could not face Mr. Booth. Brief of Appellee p.10. Mrs. Schafer attended the initial preliminary hearing date within ten days of the incident and was willing, ready, and able to testify against Mr. Booth. Mrs. Schafer did not attend the sentencing hearing because she was undergoing rehabilitative therapy that was required after her surgeries. Also, Mrs. Schafer had previously provided a typed unsigned statement, included in the pre-sentence report, stating how this injury impacted her and adversely affected her life. Mrs. Schafer did not make any recommendation or request for any prison sentence in her statement. (TR-175, 176).

The State in their response makes reference to Mr. Booth being on bond for a drug charge out of Marshall County when this incident occurred. Brief of Appellee p.14. This case was the result of a confidential informant for Marshall County law enforcement calling Mr. Booth and requesting that he meet her at the library and bring her some marijuana. The amount of marijuana Mr. Booth allegedly provided to this confidential informant was only a miniscule amount that apparently fit into a contact lens case. The State promised the confidential informant that they would not proceed against her on stolen check charges for her cooperation.

This drug case was pending but not charged by the Marshall County authorities when Mr. Booth, through his counsel, negotiated the plea on the enhanced petit larceny charges in February 2006. (Neither Mr. Booth nor his counsel were made aware of the pending drug charge). It was only after Mr. Booth went to the West Virginia Division of Correction for the one year sentence and was released after discharging that sentence that Marshall County indicted Mr. Booth on the pre-existing allegations of the felony marijuana delivery. This was the basis for a Motion to Dismiss by Mr. Booth's counsel. (See attached copy). The State filed a Notice of *Nolle Prosequi* on the date of the jury trial, August 27, 2007 dismissing the indictment.

The State asserts that the Buck case was originally remanded only for the development of the sentencing record to determine why the trial court sentenced him to seventy-five years and after developing the record re-sentenced Mr. Buck to seventy-five years. Thereafter, on a second remand the trial court re-sentenced Mr. Buck to thirty six years. Brief of Appellee fn.6. This is somewhat misleading and incorrect because this Court in the Buck case initially remanded, after finding the seventy-five year sentence disproportionate, and instructed the trial court to develop the record and to re-sentence Mr. Buck to a sentence that was proportionate to the facts. State v. Buck 173 W.Va. 243, 314 S.E.2d 406 (1984).

The same trial Judge on the first remand re-sentenced Mr. Buck to the seventy-five years requiring Mr. Buck to appeal this second sentencing order. On the second remand this Court ordered that a new judge be assigned the

case to re-sentence Mr. Buck to a sentence that was proportionate to the facts of the case. Mr. Buck was finally re-sentenced to thirty years (not thirty-six) on the second remand by a different Circuit Court Judge. This thirty year sentence was affirmed by this Honorable Court in the third Buck case. State v. Buck 178 W.Va. 505, 361 S.E.2d 470 (1987). (See copy of attached Re-sentencing Order).

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

This is an appeal of the sentencing taken from the Circuit Court of Ohio County following a plea of guilty to the criminal offense of Robbery in the First Degree whereby the petitioner was sentenced to serve not less than eighty (80) years in the West Virginia State Penitentiary.

STATEMENT OF JURISDICTION

The West Virginia Supreme Court of Appeals has jurisdiction over this action pursuant to W. Va. Code §58-5-1(j) which allows a criminal defendant to file a petition for appeal to the West Virginia Supreme Court of Appeals from "a final judgment of any criminal case where there has been a conviction in a circuit court . . ." The Defendant was convicted following his June 8, 2007 post-indictment plea of guilty to one count of Robbery in the First Degree.

On August 2, 2007, the Defendant was sentenced to serve eighty years in the West Virginia Penitentiary. The Defendant filed his timely notice of intent to appeal on August 4, 2007. The Final Sentencing Order was entered on May 23, 2008. The Petition for Appeal was filed September 18, 2008. Counsel for

Appellant presented this case before the West Virginia Supreme Court on January 27, 2009. This Honorable Court voted to grant the appeal on the same date.

ASSIGNMENT OF ERROR

The Circuit Court of Ohio County abused its discretion and violated state and federal constitutional law in sentencing the Defendant-Petitioner to a term of incarceration of eighty (80) years in the West Virginia State Penitentiary.

STATEMENT OF THE STANDARD OF REVIEW

Inasmuch as the issue raised on appeal deals solely with the sentencing, "the Supreme Court of Appeals reviews sentencing orders...under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. pt. 1, in part, State v. Lucas, 201 W.Va. 271, 496 S.E.2d 221 (1997) *cited in* State v. Middleton, --W.Va.--, --S.E.2d--, 2006 WL 3455001 (2006).

ARGUMENT

The Circuit Court of Ohio County abused its discretion and violated constitutional law in sentencing the Defendant to a term of incarceration of eighty (80) years in the West Virginia State Penitentiary. The sentence pronounced for the negotiated guilty plea to an attempted purse-snatching is impermissibly and shockingly harsh, unjustified, and disproportionate to the underlying facts of the case.

The State's argument that Mr. Booth is a vicious criminal is not supported by the facts. Mr. Booth never physically touched Mrs. Schafer he

merely pulled on her purse in an attempt to steal it. He immediately released his grasp of the purse and abandoned the crime when Mrs. Schafer fell to the ground. Mr. Booth never threatened Mrs. Schafer with any weapon. He did not even threaten her verbally; he simply ran past her and attempted to pull her purse from her shoulder. Mr. Booth's prior criminal history convictions consisted of a retail theft and two enhanced petit larcenies.

The State compares Mr. Booth with the defendant in the case of State v. King 205 W.Va. 422, 518 S.E.2d 663 (1999). Wherein Mr. King was sentenced to 84 years for aggravated robbery and that sentence was affirmed. Mr. King's case is not in any way comparable to Mr. Booth's case. Mr. King broke into an elderly woman's home at midnight and attacked her in her bed, waking her by threatening her with a knife. He then proceeded to rob this woman of her money and a firearm. The elderly victim in King was then forced at gunpoint to call her daughter and son-in-law to come over to her trailer.

The son-in-law, Mr. Anderson, was then kidnapped at gunpoint by Mr. King and forced to drive him to Clarksburg, West Virginia. During the course of the kidnapping Mr. Anderson was repeatedly threatened at gunpoint and Mr. King discharged the weapon out of the window stating that he wanted to kill a cop. The kidnapping ended in a police standoff at a roadblock where Mr. Anderson was held hostage by Mr. King. Mr. Anderson knocked the gun from Mr. King's hands while he was attempting to shoot one of the officers on the scene. The firearm that Mr. Anderson knocked from Mr. King's hands

discharged as it hit the ground, although nobody was struck by the bullet. Mr. King also had three prior felonies of entering without breaking and burglary.

The facts in State v. King, *supra*, are in no way comparable to Mr. Booth's case wherein he attempted to take Mrs. Schafer's purse as he ran by her on the street one afternoon in the middle of Wheeling. After Mr. King's violent armed crime spree, with multiple victims and a plethora of violent felonies, he was sentenced to eighty four years; only four more years than young Mr. Booth for his attempted purse snatching.

In the case of State v. Black 175 W.Va. 770, 338 S.E.2d 370 (1985) cited and distinguished by this Court in the King case *supra*, this Court affirmed a fifteen year sentence for aggravated robbery and a twenty year sentence for kidnapping. These sentences were ordered to be served consecutively for a total of thirty five years for both the kidnapping and the aggravated robbery charge. In this case Mr. Black and an accomplice entered a Holiday Inn in Huntington, West Virginia and told the employees that he had a gun ordering them to empty the cash register. Mr. Black and his accomplice then ordered two of the hotel employees into his car, later releasing them in a nearby park.

The Court affirmed the thirty-five year sentence finding that Mr. Black had an extensive criminal record – over 50 misdemeanor convictions – that he was actively involved in the commission of both crimes, was the possible leader of the pair, felt little or no remorse, was not a candidate for probation, his psychiatric evaluation indicated egocentricity and impulsiveness, and his co-defendant received the same sentence. Mr. Booth's sentence for his conviction

is more than twice that of Mr. Black who committed an armed robbery of two people, whom he then also kidnapped to exploit as hostages for his getaway.

Table 1 – Matrix of Aggravated Robbery Cases, Relevant Factors, and Proportionality of Sentences

	Glover (1983)	Mann (1999)	Buck (1984)	Cooper (1987)	Booth (2009)
Age of defendant	Middle-aged	Late 30's	23 years old	19 years old	20 years old
Weapon	No	Gun	Tire Iron	No	No
Beat or stuck victim	Yes, severe beating	Yes, struck	Yes, struck in head, maimed	Yes, Struck	No
Stripped victim naked, left to die	Yes	No	No	No	No
Threat to kill	unknown	Yes	No	No	No
Prior violent offenses	Yes, multiple offenses over 20 years	Yes	No	No	No
Expressed remorse	No	No	Yes	Yes	Yes
Rehabilitation potential	No	No	Yes	Yes	Yes, see NRJ & DOC certificates
Original sentence	75 years	30 years	75 years	45 years	80 years
Recommended sentence	n/a	Affirmed 30 yrs.	n/a	10 years	TBD
Final sentence	75 years	30 years	30 years	25 years	TBD
Supreme Court comments	"In short, it would be difficult to have a more egregious case of aggravated robbery or a person who would be more suited for long-term removal from society."			Length of original sentence was "so shocking"	

Mr. Booth's case is most analogous to the Buck and Cooper cases wherein this Court found that the sentences were disproportionate and violated the West Virginia Constitution. The matrix above lays out significant factors from those cases along with two others that the State tried to relate to Mr.

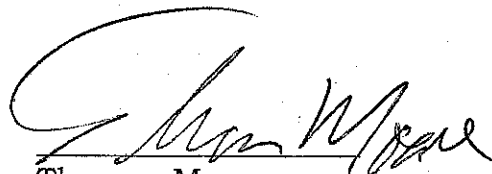
Booth's case. Reviewing these essential factors summarized in the matrix above demonstrates several things. First, Mr. Booth is young, he did not use any weapons, he never struck her, he never threatened her, he has no prior history of violence, he expressed remorse, and he is an excellent candidate for rehabilitation. Second, the State's reference to the Glover case is absolutely inapplicable. In fact, if anything, it demonstrates how outrageous Mr. Booth's 80 year sentence is. Regardless, further inspection of the facts in all of these cases shows that the appropriate sentence range for Mr. Booth is ten to twenty-five years maximum.

RELIEF

WHEREFORE, for the forgoing reasons, the Court is asked to reverse the sentencing decision of the Circuit Court of Ohio County and remand the case for proportionate re-sentencing consistent with law, and to provide such other relief that this Honorable Court finds just and necessary.

RICHARD BOOTH
Respectfully submitted,

By:

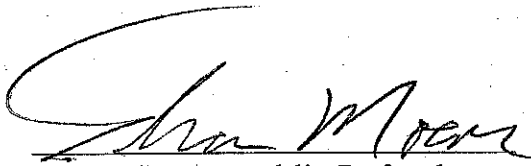


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of May 2009 that service of the foregoing petition for appeal was made upon the Respondent, the State of West Virginia, by mailing a true copy thereof by United States mail, postage prepaid to Scott R. Smith, Prosecuting Attorney for Ohio County at his office 1500 Chapline Street, Wheeling, WV 26003, his last-known address.


Assistant Public Defender

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE